

BEFORE THE THREE MEMBER DUE PROCESS PANEL
CONVENED PURSUANT TO RSMo. Sect. 162.961

CAMDENDTON R-III SCHOOL DISTRICT)	
)	
Petitioner,)	
)	
vs.)	
)	
, et al.,)	
)	
Respondent.)	

DECISION OF THE THREE MEMBER PANEL

COMES NOW this Three Member Panel, duly appointed to hear the Due Process request above-styled, and renders its decision regarding the issues placed before the Panel.

HISTORY

The Due Process Request in this matter was made by the District, regarding its duty/right to initially evaluate a child living within the geographical boundaries of the District, which child the District alleged to have reason to believe is in need of special education services, or is qualified for special education services under IDEA, Part B.

The Parents of the child (Parents) and the District have long been trying to reach mutually agreeable terms as to the evaluation and placement of the child. The child attended the District school for many years, but did not receive any special education services under IDEA during that time. During the time the child was in attendance at District school, information concerning the child's behavior and scholastic achievement

led the District to believe that it should evaluate the child for disabilities which could qualify him for special education services under IDEA.

Parents had private evaluations done on the child which were provided to the District, but would not consent to an evaluation by the District, which included those tests the District deemed necessary in order to determine the child's disability status or eligibility for special services under IDEA. District and Parents, by notice and procedures outlined in the pertinent rules and statutes, held multiple meetings in order to formulate an evaluation plan for the child. None of the resulting evaluation plans had gained the Parents' written consent, at the time the Due Process Hearing was held.

During the pendency of the Due Process Request of the District to gain an Order to evaluate the child, the Parents' Attorney of the Home School Legal Defense Association, Mr. James R. Mason, III, Attorney at Law, filed a Motion to Dismiss the Due Process Request, based generally upon the grounds that the child at that time was being Home Schooled, and the Parents were not requesting FAPE of the District. The child had been removed from public education in November 2002, and had been Home Schooled up to the time of the Hearing. The Parents each executed an Affidavit to the effect that they were not requesting FAPE regarding their son from the District.

The Chairperson of the Panel requested and received briefs from respective Counsel on the issues of Child Find, Evaluation, and Parental Consent to evaluation, and also conducted a pre-hearing teleconference for the Attorneys to argue their respective positions on these matters on February 24, 2003, at 10:00AM CST. On March 6, 2003 a letter ruling was issued denying the Parents' Motion to Dismiss the Due Process Request of the District. This Letter Ruling is attached to this Decision and made part hereof by

this reference as **EXHIBIT A**. The Panel Chairperson made this letter ruling unilaterally, and without the input or consent of the other respected Panel Members, due to the fact that the Motion to Dismiss concerned issues purely of law and presented no questions of fact. In the transcript of this proceeding, this letter ruling was identified and placed in the record as Panel Exhibit C.

The participation of the Attorneys for the Parents was identified by the participating Home School Legal Defense Association attorney James R. Mason, III, as being a special appearance, only for the purpose of contesting the Jurisdiction of this Panel to hear this Due Process Request, due to the fact that the Parents did not have the child enrolled in the District at that time and were not requesting FAPE from the District. For this reason, neither the Parents or the Attorneys for the Parents appeared or were represented at the Hearing of this matter, which was held March 13, 2003, at the District Administrative Offices.

The Hearing of the matter was held at the District Administrative Offices, starting at 8:30AM, on the 13th day of March, 2003, and concluding at approximately 11:45AM that same day.

ISSUES

1. Does a Local School District have the right or duty to initially evaluate a child who is domiciled within its geographical boundaries and for whom the District has reason to believe he/she may be eligible for services under IDEA?

2. Is the right or duty (if any) of the Local School District to initially evaluate a child (whom the District has reason to believe may be eligible for services under IDEA) located within its geographical boundaries extinguished by the Parents' withdrawal of that child from public education?
3. In the event a child (whom the District has reason to believe may be eligible for services under IDEA) located within the geographical boundaries of the District is withdrawn from public education and requests no FAPE from the District, and the Parents of the child do not wish to have the District conduct an evaluation of the child, does this extinguish the right or duty of the District to evaluate the child?

DISCUSSION

The hearing of this matter occurred on March 13, 2003, at the Administrative Offices of the Camdenton R-III School District (District). The District was represented by Ms. Terri Goldman, Attorney at Law, and evidence was adduced. The Panel admitted into the record a document from the Home School Legal Defense Association Attorney, Mr. James R. Mason, III (Parents' Attorney), dated March 4, 2003, wherein the Parents' Attorney, in pertinent part, stated that neither the Attorneys nor the Parents would be appearing on the merits of the Due Process Request filed by the District. This correspondence was labeled Panel Exhibit A, and is attached to this Decision and made part hereof by this reference as **EXHIBIT B**. The Parents' Attorney had previously

entered its appearance for the limited purpose of filing a Motion to Dismiss the Due Process Request of the District, on Jurisdictional grounds.

The Panel also entered into the record of the hearing correspondence dated February 28, 2003, in which District's Attorney requested that the timeline for decision of the Panel be extended to April 17, 2003, which was labeled Panel Exhibit C, and is attached to this Decision and made part hereof by this reference as **EXHIBIT C**. A letter ruling extending the deadline for decision to Friday, March 28, 2003, was issued upon the oral agreement of Counsel for both parties by correspondence dated February 26, 2003 from the Panel Chairperson to all interested parties, and is attached to this decision and made part hereof by this reference as **EXHIBIT D**. The deadline for decision was corrected on the record of the hearing to correspond with the written request of Counsel for the District, so the deadline for decision in this matter now stands at April 17, 2003.

Upon commencement of the Hearing, District Attorney requested that **Petitioner's List of Witnesses and Exhibits** be entered into evidence, and such list and exhibits being timely received in accordance with the rule for exchange of documents in a Due Process Hearing, and there being no objection to the entry of the same into evidence, the same was admitted as **PETITIONER'S GROUP EXHIBIT A – P1 through P50**.

The District put on two witnesses, Ms. Kristy M. Kindwall and Ms. Tammy Huchison Lupardus, who acted for the District as a Special Education Teacher and Director of Special Education Services for District, respectively. They each testified to the reasons the District had to believe that the Student might qualify for services under IDEA and the District's procedure and efforts to formulate an evaluation plan and gain

written parental consent thereto, so that the District could move forward with its proposed evaluation.

The evidence presented established that the child had shown behaviors and scholastic progress which put the District on notice that the child may have disability(ies) which would qualify him for services under IDEA. The evidence likewise showed that the District and the Parents had spent several years in their attempts to formulate an Evaluation Plan satisfactory to both sides. Parents participated in the formulation of the various versions of evaluation plans in an extensive and prolonged way, with the required procedural notices and meetings being represented in the **Petitioner's List of Witnesses and Exhibits**. It is also clear from the evidence presented, that the District did consider the Parents' requests and desires in regard to the formulation of an evaluation plan for the child, and that the District modified its proposed evaluation plans on several occasions in order to accommodate the parents' wishes. Nevertheless, written parental consent for an evaluation of the child by the District had not been forthcoming at the time of the Hearing.

MOTION TO DISMISS

In regard to the Respondent's Motion to Dismiss the Due Process Request of the District in this matter, the specific issues raised were the Standing of the District to raise a Due Process Request in order to obtain an initial evaluation upon a child living within its geographical boundaries, for whom the District had reason to believe IDEA services may apply, and whether this Panel has Jurisdiction to Order that the child be evaluated.

In regard to the Standing issue, “ If the parents of such child refuse consent for the evaluation, the agency may continue to pursue an evaluation by utilizing the mediation and due process procedures under Section 1415 of this title, except to the extent inconsistent with State law relating to parental consent.” **20 USC Sect. 1414(a)(C)(ii)** No authority for the proposition that Missouri has any state law contrary to the procedures set forth for obtaining such consent has come or been brought to the attention of this Panel. It should be noted that the foregoing quote is a prerequisite to provision of services under IDEA, and that the Parents have attempted to waive the child’s right to FAPE through their Affidavits, which were attached to the Motion to Dismiss. However, no authority has been provided to nor found by this Panel, which would give the Parents the right to forever waive the child’s right to FAPE, should the circumstances change and FAPE be requested at some point in the future. The “Child Find” obligations of the District appear clear. “**All** children with disabilities residing in the State, regardless of the severity of their disabilities, and who are in need of special education and related services, are [to be] identified, located, **and evaluated** and a practical method is developed and implemented to determine which children with disabilities are currently receiving needed special education and related services.” **20 USC Sect.1412(a)(3)(A)(emphasis supplied)** It seems to this Panel that, in order to identify and locate, the District needs to be able to evaluate. District cannot evaluate without parental consent. The Standing issue is ruled against the Respondents.

In regard to the issue Respondents raise as to the Jurisdiction of this Panel to hear this matter, given the facts and history presented above, the issue of this Panel’s Jurisdiction to hear this Due Process Request of the District seems barely distinguishable

from that raised by the Standing issue. Although it was not brought up by counsel, the issue of ripeness for adjudication is the only distinguishing point this Panel can detect, that could separate the issues of Standing of the District to bring its Due Process Request which led to this Hearing, and the Jurisdiction of this Panel to decide the question. It could be argued that since the child is being home schooled at this time and there is no request for provision of FAPE by the District to the child at this time, the issue of evaluation of the child by the District is not ripe for determination. However, a literal reading of the “Child Find” provisions cited above persuades this Panel otherwise. It is clear to this Panel that the “Child Find” provisions are just that, rules in place to assure that all children with disabilities that could enable them to receive services under IDEA are ascertained and accounted for, regardless of their current disposition vis a vis a publicly funded education, tailored to fit their specific needs. For these reasons, the Jurisdictional issue, also, is ruled against the Respondents.

The one case that seemingly runs contrary to this analysis, at least in dicta contained therein, which dicta has been cited in more recent decisions by IHO’s, apparently without necessity, is Gregory K. v. Longview School District, 811 F.2d 1307 (9th Cir. 1987). Contained in that case in the final page, in discussion of the District’s request to reevaluate the Student therein, it is stated, “If the parents wish to maintain Gregory in his current private tutoring program, however, the District cannot require a reassessment.” In another case, the IHO took this statement farther in stating, “Of course, if the parents do not want public funding for the child’s education, then they may keep the child out of public school and place him/her in private school (or home school) at their own expense and avoid evaluation altogether.” 33 IDELR 19, at p.4, citing Gregory

K. In the IDELR case, the student was enrolled in the District requesting evaluation and the IHO held that the District could evaluate, “so long as he remains a student in the Haleyville City School system”. Id. at p.4. Why the preceding dicta regarding avoiding evaluation altogether was added to this opinion escapes this writer.

However, we believe that the dicta from these cases does not control the outcome of this one. We believe that the evaluation is in the best interests of this child, in that if the Parents should decide that they cannot afford or manage the privately funded education the child is now receiving in the future, the District has a “Child Find” obligation to have identified and evaluated the child, should FAPE then be requested, so that the provision of an individualized education to the child, including, if appropriate, IDEA services, can be provided post haste, without the lapse in education that would result if we should rule testing necessary only if or when FAPE is requested. Furthermore, we believe there is merit in the District’s argument that if it does not initially evaluate the student, when it has reason to know that the child may qualify for IDEA services, it may be held responsible for failure to follow the “Child Find” directives, at some unascertainable point in the future.

STATEMENT OF FACTS
(* indicates stipulated fact)

1. The Student at issue in this case resides within the geographical boundaries of District.*
2. The Student, through his Parents, has rejected any Public Education Services (FAPE) for the Student, at this time.*

3. The evaluation requested by the District in this case is an initial evaluation.*
4. The Student left the District and entered private (home schooled) education voluntarily, on or about November 14, 2002.* (Tr. p.77)
5. Prior to the Student being withdrawn from public school, he had attended the District's schools for a number of years. (Tr.p.10)
6. During the time the student was enrolled in District schools and since the time student was withdrawn from District schools, the District has attempted to gain parental consent for an initial evaluation of the student. (Tr. pp. 26, 49-53, 58-108, 156-160, 181, 193-194, 223-228, 253, 257-261, 262; Ex. P-12, P-26, P-29, P-46, P-49, P-50)
7. District has followed all Due Process rules and procedures concerning Parental notice and participation in the formulation of an evaluation plan for student. (**same citations as for #6, above**)
8. District has considered and attempted to accommodate parental concerns and suggestions concerning the content of the proposed Evaluation Plan. (Tr. pp. 24-35, 36-41, 46-48, 49-53, 109-115, 116, 132-140, 161-178, 182-189, 190-191, 195-200; Ex. P-8, P-13, P-21, P-22, P-24, P-27, P-30, P-33, P-34, P-36, P-40, P-42, P-43, P-44, P-48)
9. District has demonstrated that it has sufficient reason to suspect that Student may have disability(ies) which could qualify him for services under IDEA, such that the "Child Find" obligations or duties, such as

they are or might be, are made effective in this circumstance. (Tr. pp. 22, 43-44, 52-55, 68, 71, 81)

10. Under the Missouri State Plan, the “Private Schools” provisions specifically include “Home Schooled” children, for purposes of application of IDEA to Missouri children. (Missouri State Plan for IDEA, at pp. 87-88)
11. To date, no written consent of the Parents to evaluate the student has been forthcoming or received by the District. (Tr. p. 69)

CONCLUSION AND ORDER OF THE PANEL

IT IS, ACCORDINGLY, HELD BY THIS PANEL, THAT:

1. District is hereby granted leave to evaluate the student as soon as is practical. During this initial evaluation the Leiter Test will not be applied, as a part of the initial evaluation test battery. All other testing included in this initial battery shall be at the discretion of the District, in accordance with the proposed evaluation plan at Ex. P-48, pp. 256-261.
2. In the event that the Student is re-enrolled within the District Schools, then in that event, a reevaluation of the student shall be conducted by District at or as near as practically possible to the time that the Student completes two (2) months of schooling within the District. At the time of the reevaluation (if any), the originally used battery of tests will be re-employed, and, in

addition, the area of auditory processing will be assessed to determine the need for further evaluation in that area.

3. All cost and expenses whatsoever connected with or caused by the testing ordered by this Panel shall be borne by the District.

APPEAL RIGHTS

In addition to any other remedies offered by law or regulation, any party dissatisfied with the decision of this Panel may bring an appeal pursuant to Chapter 536 Revised Statutes of Missouri, and/or 20 USC Sect. 1415(e)(2).

SO ORDERED, THIS DAY OF ,2003.

David Potashnick, Panel Chairperson

Dated: _____

Karla Duff-Mallams, Panel Member

Dated: _____

Brenda Bird, Panel Member

Dated: _____

